No. 83-973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

MISCELLANEOUS:

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ARGUMENT[1]

I.

(a) OPM's determination to compute the retirement benefits for postal substitutes ("PTF's") on the assumption that they are no longer "subject to call" concededly (Pet. 2a, 34a) contravenes "the important governmental interest of protecting individuals who planned their retirement in reasonable reliance on the law in effect prior to" that determination. See *Heckler v. Mathews*, —— U.S. —— (No. 82-1050, decided March 5, 1984), slip op. 21 (hereafter "*Heckler*"). For that determination,

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[1] Throughout this Reply "Pet." will refer to the Petition for Certiorari, including its Appendix; "Br. Opp." will refer to the Brief for the Federal Respondents in Opposition.

which the Court of Appeals sustained on an entirely different legal theory, "reduc[ed] the annuities PTF's can expect to receive" and thereby "eliminated the *quid pro quo* for their availability, on which they had relied in continuing to work at USPS" (Pet. 34a; cf. *Heckler's* reaffirmation of the principle that "'[g]reat nations, like great men, should keep their word,' *Astrup v. INS*, 402 U.S. 509, 514, n.4 (1971)" (slip op. 19.)) *Heckler* held that the "protection of reasonable reliance interests is not only a legitimate governmental objective: it provides 'an exceedingly persuasive justification' for the statute at issue [t]here." *Id.*, slip op. 17, quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461. By the same token the utter disregard of that reliance interest by OPM and the court below is an "exceedingly persuasive justification" for review by this Court.

(b) The Brief in Opposition does not dispute the importance of this case. On the contrary, it indicates that the impact of the Court of Appeals' decision may extend beyond the 113,000 Postal Service employees (active when OPM issued its initial determination) who the Court of Appeals acknowledged are adversely affected thereby (Pet. 2a, 34a.). For, in its final footnote, the Brief in Opposition states:

> The court of appeals did not indicate what effect its opinion was to have on employees who have already retired. That is a matter it presumably left for further proceedings. We are informed by OPM that it does not intend to seek recovery of payments already made under the prior system of computation. See 5 U.S.C. 8346(b). [Br. Opp. 10, n.4]

Thus, while disclaiming an intent to recoup from retirees "payments already made under the prior system of computation", respondent OPM reserves the right to reduce future payments to "employees who have already retired" by extending OPM's new computation method to those retirees. We do not accept respondents' self-serving as-

sertion that the Court of Appeals "presumably left [such reductions] for further proceedings." But it cannot be gainsaid that OPM has now informed this Court and many thousands of retirees that the change in computation, which "overturned 50 years of administrative practice" also jeopardizes the "financial planning and economic security" (Pet. 34a) of the retirees, who must wait anxiously while OPM decides whether to drop the other shoe, as the Postal Service—which set this entire process in motion—can be expected to urge in order to save even more money at the expense of its faithful long-time employees. (Pet. 6a-7a).[2]

In sum, the Court's recognition in *Heckler* of the important governmental interest in protecting retirement expectations, and respondents' pointed warning that OPM may seek to reduce the benefits of individuals who are already retired reinforces our original submission that review of the decision below is warranted because of its severely adverse impact on the large class of federal employees (Pet. 9-10).

II.

(a) The Brief in Opposition provides neither precedent nor reasoned argument to support the Court of Appeals' novel and far-reaching theory that *SEC v. Chenery Corp.*, 318 U.S. 80; 332 U.S. 194 does not apply to interpretive rulemaking. (Pet. 26a). Respondents' point that because the change in method "was an interpretive rather than a legislative rule" the Court of Appeals "was entitled to look afresh at any assumptions the agency may have made about the meaning of the Act" (Br. Opp. 6, n.1) pertains to the *scope of review* ("deferential" or *de novo*), and not to the question whether, in

[2] It will be recalled that OPM's predecessor, the Civil Service Commission (CSC), originally applied its new policy to employees in third-class post offices. This Postal Service then prevailed on the CSC's subordinate Bureau of Retirement, Insurance and Occupational Health to sweep another 100,000 employees under that ruling. See Pet. 7.

reviewing an administrative decision, the Court may affirm such a decision on grounds entirely different from those adopted by the agency. That these are entirely distinct issues of administrative law is not only obvious as a matter of logic, but is confirmed by the fact that neither of the decisions cited by respondents[3] was an instance of a court affirming an administrative agency on a new ground, and thus neither decision so much as mentions *Chenery*.

Respondents, however, advance a different ground for disregarding the admonition of *Chenery*:

> Given the court of appeals' interpretation of the Civil Service Retirement Act, the principle announced in *SEC v. Chenery Corp.* has little to do with this case. [Br. Opp. 5]

This assertion should be recognized for what it is—question-begging pure and simple. The Court of Appeals' interpretation of the Civil Service Retirement Act is not a "Given" in this Court—its correctness is challenged in the second question presented by the Petition (Pet. i, 13-22). Even more important, the Court of Appeals' interpretation of the Act was not a "Given" when that court was called to review the OPM's decision. Rather, under *Chenery* the only question properly before the court was whether OPM's decision could be sustained on the agency's premise, namely that the postal substitutes are no longer subject to call. Respondents' statement that the Court of Appeals "correctly felt obliged to consider first" an interpretation of the statute on which the agency's decision was not based, and which neither party argued, reverses both the mandate of *Chenery* and the normal course of adversary litigation.[4]

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[3] *General Electric Co. v. Gilbert*, 429 U.S. 125; *Skidmore v. Swift & Co.*, 323 U.S. 134.

[4] Indeed, if the court is "obliged to consider" a rationale for decision other than that on which the agency's decision is based, what

It is ironic that having prevailed in the Court of Appeals, despite *Chenery*, on a theory inconsistent with that on which OPM's determination was based, respondents now argue to this Court that *Chenery* is inapplicable on a theory different from that of the Court of Appeals. To be sure, *Chenery* recognizes that a higher court may sustain the decision of a lower court on different grounds, and distinguishes judicial review of administrative determinations on just that basis, 318 U.S. at 88. But in the present posture of this case the court of appeals with the largest administrative review docket has determined that *Chenery* is inapplicable to a major category of administrative decisions—interpretive rules. That holding is indisputably of great significance, quite aside from the immediate context of this case.

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is the point of this Court's repeated admonitions (as a corollary to *Chenery*) that reviewing courts may not rely on the *post hoc* rationalizations of appellate counsel? See, *e.g.*, *Burlington Truck Lines v. ICC*, 371 U.S. 156, 168-169. At least, if agency counsel were free to argue such an alternative legal theory the party seeking review of the agency's action would have the opportunity to persuade the court before it decides the case that the legal theory is unsound—an opportunity denied to this petitioner.

The importance of strict adherence to the *Chenery* principle is illustrated by this case. The Court of Appeals refused to give weight to the Secretary of Interior's original interpretation of the Retirement Act on the ground that it was not "contemporaneous" with the 1926 amendment to the Act; the Court assumed that the Secretary's decision was made in 1928 and was based on a prior opinion of the Comptroller General. While we submit that this question of timing is immaterial because it misreads *Norwegian Nitrogen*, see Pet. 17-18, the decision below rests heavily on the foregoing assumption, which is reasserted as fact at Br. Opp. 2. Yet the Postal Service originally presented this sequence of events as a surmise, see Pet. 18, n. 10, quoting J.A. 202-203, and no evidence has been cited by either the Court of Appeals or the respondents in support thereof. If the issue of statutory interpretation had been considered by the agency in the first instance, or were now to be considered by it on remand in accordance with *Chenery*, the agency could search its records to determine the origins of the Secretary's interpretation, and thereby to refute or verify the court's assumption.

Moreover, the Brief in Opposition unwittingly confirms that the Court of Appeals' restriction of *Chenery* is indefensible. That holding should not be allowed to stand unreviewed.

(b) 1. Respondents' emphasis on what they term "the obvious: here, as was true in *Norwegian Nitrogen Products Co.* [*v. United States*, 288 U.S. 294] the result reached by the court of appeals is consistent with that urged by OPM and the Postal Service, the agencies most directly concerned with the interpretation of the Civil Service Retirement Act in this area." (Br. Opp. 9). The foregoing proposition is not only far from "obvious", it is untrue except in the cynical and legally irrelevant sense that OPM and the Postal Service "won" and postal service employees "lost" under both OPM's decision and that of the Court of Appeals. In practical terms the differences in result are, to "emphasiz[e] the obvious" (*id.*), that 1) under the original interpretation of the Act the annuities to which the PTF's are entitled depend on whether OPM correctly decided that they are no longer "subject to call," [5] whereas under the Court of Appeals' construction this question of fact is "immaterial" (Pet. 27a); and 2) under the original interpretation OPM had not remotely suggested that it has the power to reduce past retirees' benefits (Br. Opp. 10, n.4). More fundamentally, the *Norwegian Nitrogen* principle is not a device for keeping score or identifying winners and losers; it is a guide to the decision of fairly debatable questions of statutory interpretation. Specifically, this principle brings to bear the accumulated insight of the officials "most directly concerned with the interpretation of the statute" (Br. Opp. 9) and accords due weight to the reliance which inevitably builds around

[5] Petitioner urged in the court below that PTF's are entitled to a trial on that issue in this review porceeding; respondents, conceding the materiality of this issue, asserted that the PTF's would be afforded such a hearing by OPM. Under the Court of Appeals' decision the PTF's are denied a trial in any forum.

a longstanding practice (see Pet. 15-16). The Court of Appeals concededly reached an interpretation of the Civil Service Retirement Act inconsistent with over fifty years of administrative practice thereunder, and in so doing deliberately gave no weight whatsoever to the teachings afforded by that practice. Thus, since Justice Cardozo (and his followers on this Court) have been concerned with the correct interpretation of statutes (to which a longstanding practice is highly relevant) and not with the immediate satisfaction of result-oriented agencies, the decision below results from precisely "the kind of judicial disrespect for agency practices that *Norwegian Nitrogen Products Co.* addressed" (cf. Br. Opp. 9).

2. In the Petition (pp. 18-19) we pointed out that the Court of Appeals erred in its reading of the statutory language (Pet. 28a-30a) because the critical statutory term "average pay" is defined as "the largest annual *rate* resulting from averaging an employee's or Member's rates of basic pay in effect over any 3 consecutive years of credible service." 5 U.S.C. § 8331(4) (1976) (emphasis added). Respondents' defense of the Court of Appeals' reading gives a misleading impression of OPM's practice. The issue turns on whether, as the Court of Appeals believed and respondents now argue, for annuity purposes employees are credited only with earnings which they received. Under the general heading "d. *Basic pay rate to be used*" the *Federal Personnel Manual* states quite clearly under the subheading "(1) *In general*" that "In computing a high-3 average pay, the rate of annual basic pay—not the pay actually received by the employee—is to be used * * *" (*Federal Personnel Manual*, 831-1 Inst. 31 (Sept. 21, 1981), p. 60, quoted at Pet. 19, n.11.)

Although respondents assert that "the point of that statement is not to authorize computation of annuities based on amounts never earned" (Br. Opp. 8, n.3), the example which they give provides no support for this interpretation. Rather, it appears under subheading "(3) *Part-*

Time Rates" and sets forth the basic pay *rate* of part-time employees. " 'For example, an employee whose annual basic pay is $8,000 but who is employed half-time would have a basic pay *rate* of $4,000 per annum.' " (*Id.*, emphasis added). The part-time employees are paid according to that "basic pay rate," whether or not they actually *receive* that amount in any given year. Thus, to carry forward the respondents' example, if the half-time employee actually worked only three-eighths of the time during a year because of illness he would receive only $3,000, but his annuity would be computed on the basis of his "basic pay rate" of $4,000 per annum. Far from negating the principle of subparagraph (1) that the basic pay rate, rather than the amount received, is to be used, subparagraph (3) simply declares what the basic pay rate shall be for a class of part-time employees who, unlike the postal substitutes, are on a regular schedule.

3. At Pet. 15-16 we stressed, on the authority of *Bankamerica Corp. v. United States*, 103 S.Ct. 2266, 2272-2273, that a longstanding administrative practice builds up a reliance interest among the affected members of the public—there company directors—which the courts should not lightly overturn.[6] Respondents' assertion that "the expectations of [113,000] individual substitutes to which petitioner refers shed little additional light on the correct interpretation of the Act itself" (Br. Opp. 10) is contrary to the teachings of *Bankamerica*. And *Heckler v. Mathews*, discussed above, strongly supports our submission that "the postal substitutes' reliance throughout

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[6] We of course do not contend that *Norwegian Nitrogen* or *Bank America* "lay down a per se rule that agency practices of long standing are binding on the courts" (Br. Opp. 9). Indeed, we expressly disavow such a contention (Pet. 18). Respondents prefer to demolish a straw man of their own creation to addressing our actual contentions that the court erred in stating that there were *conflicting* administrative interpretations of the Act (Pet. 16-17) and that the court's construction of the Act misconceives and undermines the policies of the 1965 amendments to the Retirement Act (Pet. 20-22).

their working lives that their retirement benefits would not be reduced by a novel statutory construction is worthy of [considerable] respect." (Pet. 16).

CONCLUSION

For the foregoing reasons, and those stated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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